

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

CR 01-1428 JC

JOSHUA BAER,

Defendant.

**DEFENDANT'S MOTION TO DISMISS FOR AN UNCONSTITUTIONAL TAKING**

Defendant, Joshua Baer, by and through his attorney Peter Schoenburg and pursuant to the Fifth Amendment of the United States Constitution and Rule 12(b)(2) of the Federal Rules of Criminal Procedure, respectfully petitions this Court to dismiss the indictment in this case because the prohibition on the possession and sale of art objects in violation of the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act ("MBTA") or the Native American Grave Protection and Repatriation Act ("NAGPRA") amounts to an unconstitutional taking of Mr. Baer's private property without just compensation. In support of this motion Mr. Baer states:

1. Mr. Baer has been charged with multiple violations of the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act and the Native American Grave Protection and Repatriation Act. 16 U.S.C. §§ 668, 703 and 707; 18 U.S.C. §1170; and, 25 U.S.C. § 3001(3)(c). These alleged violations appear to be based on Mr. Baer's simple possession or offer to sell the parts of bald eagles, gold eagles, or other migratory birds at his art gallery in Santa Fe.

2. All of the items which Mr. Baer possessed in violation of these Acts had been given to him by friends from various Native American tribes over the course of many years. Some of these objects contained feathers of unknown origin, and other artifacts are allegedly ceremonial objects used in Native American rituals.

3. Any prohibition on the simple possession or sale American Indian artifacts which contain golden eagle feathers, the feathers of a migratory bird, or which otherwise have ceremonial significance violates the Just Compensation and Takings clause of the Fifth Amendment of the United States Constitution.

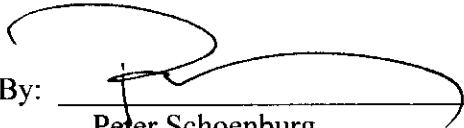
4. The regulatory taking which is effected by the application of the provisions of Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act and the Native American Grave Protection and Repatriation Act to items which were in existence prior to the effective dates of the Acts violates the Fifth Amendment because such a retroactive application does not substantially advance a legitimate state interest and denies Mr. Baer any economically viable use of his property.

5. Defendant requests an evidentiary hearing in support of this motion to, in part, demonstrate the age and ownership of the disputed items.

6. Opposing counsel, Assistant United States Attorney Mary Catherine McCulloch has been informed of this motion to dismiss for an unconstitutional taking, and she opposes the motion.

Respectfully submitted,

ROTHSTEIN, DONATELLI, HUGHES,  
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By:   
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Attorneys for Defendant Joshua Baer

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of February, 2002, I served a true and correct copy  
of the foregoing pleading on the following counsel by first class U.S. mail, postage prepaid:

Mary Catherine McCulloch, AUSA  
P.O. Box 607  
Albuquerque, NM 87103

  
ROTHSTEIN, DONATELLI, HUGHES,  
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